Our Country's Constitution, Part 1 (1,448 words)

Reviving Article 5

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Why amend the Constitution?

Before I wander off in to the mechanics of amending our Constitution, let me mention why I am placing these suggestions before my readers.

We have 220+ years of the American experiment with multi-level sovereign governments under a written Constitution. This experience has revealed, in this layman's view, that the federal government has a tendency, particularly over the last 100 years to grab extra power and downgrade the role of the states. Much of this has been done in spite of a written Constitution that, under any plain reading, does not allocate those powers to the federal government.

This has significant effect on citizens who have become more remote from their government. Also it has led to increasing dissatisfaction with that government and a feeling that the government exists not to serve the people, but to rule them.

I propose to explore some modest updates (amendments) to our Constitution that may clarify its original intent and help return our government to one that is more truly "by the people and for the people."

Why amend Article 5?

First, a modest change that will help revive an unused portion of the Constitution; the convention method for proposing amendments.

Change or elimination of Congressional compensation and benefits, increased qualifications for office, or reduced retirements are extremely unlikely to ever make it through the U.S. Congress. You can probably come up with a few more that would get mysteriously stuck in the legislative process.

Congress was able to initiate a constitutional amendment limiting the President to only two terms because Constitutional amendments do not require the President's signature.

There is a method for amending the Constitution that does not require an affirmative vote by Congress, but it is never used. We will explore why, and suggest a way to rescue its utility.

The ways in which the Constitution is amended

There are two formal and two informal ways in which our constitution is amended. The formal ways are specified in the Constitution's Article 5:

> **The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; …**[i]

The first method (the Congressional-State method) requires a 2/3 vote of each house of Congress to propose an amendment and then that amendments' approval by ¾ of all the state legislatures or approval by ¾ of states in special state conventions called for that purpose.

The second method (the Convention-State method) requires that the legislatures of 2/3 of the states request a Convention to propose amendments. The Congress shall then call a Convention and any amendments proposed by that Convention are then resubmitted to the states. Adoption requires approval by ¾ of the states.

The third method (informal) is for the Supreme Court to interpret the Constitution in a new way.

The fourth method (informal) is to ignore the Constitution. This method is frequently used, but is always subject to challenge in the courts.

Why are the informal ways often used?

The formal Congressional-State approval process is long, difficult and intentionally cumbersome. Asking Congress to approve by a 2/3 majority in both houses is highly unlikely if the proposed amendment affects the power of the members or decreases the power of the federal government in relation to the states.

The formal Convention-State approval process is also long, difficult and intentionally cumbersome. It has never been repeated after the original 1787 Constitutional Convention for fear of a "runaway" convention. Therefore, people who are impatient or doubtful of their success, chose the informal routes.

Court interpretation has often been used to either broaden or modify the constitution. Depending on the philosophy of the Supreme Court's majority and their ability to develop plausible justifications for their actions the Court may be more or less "active."

Running things through the Court takes considerable time, so Presidents and Congress blithely ignore the Constitution. Often they either ignore their oath of office or accept some very broad interpretation of the Constitution and pass laws and make administrative decisions. Those decisions leave ordinary citizens gaping at their arrogant disregard for the actual language of the Constitution.

Correcting informal interpretations

If the administration or Congress does something that appears unconstitutional, the first line of the citizen's defense is to bring suit in federal court. Be prepared for a long, expensive battle. To bring such a suit one must also have "standing," which means incurring direct material damages. Speculative, incidental, or theoretical injuries do not count.

The courts will try very hard to resolve the issue without new constitutional interpretation. It helps considerably if a large number of state governments bring suit, as in the current battle of the mandatory insurance provisions of Obamacare.

If the source of what one believes was an erroneous constitutional interpretation by the Supreme Court -- good luck! Many years and a change in the Courts' composition may be your only hope for a review. Even then it may be unlikely, since courts normally give significant deference to preceding decisions (*stare decisis*). A more likely avenue for relief, if the administration agrees with your position, is to fail to enforce the provision. Congress can also withhold funding for enforcement. Even these actions for relief may be short-lived because other parties can then sue for enforcement.

Why is the Convention-State method not used?

If Congress will not set an amendment process in motion, there is the alternative of a constitutional convention. This has been discussed many times, but the states have always rejected such requests giving the excuse that they fear a "run away" convention. It is feared that such a convention would propose such major changes to the U.S. Constitution as to undermine our remaining freedoms or structure of government. They have as an example the original constitutional convention. That convention was called to study alterations to the Articles of Confederation. They essentially threw out the Confederation and started from scratch.

Of course ¾ of the states would have to agree to any changes, but confidence in the perspicacity of our current citizens is also in doubt. Personally, I have confidence in our citizens, but the justification for viewing this route to amendment as dangerous still stands.

Therefore, I suggest doing something about the potential danger of a "run away" convention.

Making the Convention-State method viable

In Alaska constitutional conventions can be called by the legislature at any time. There is also a provision mandating a vote by the people every 10 years on whether to have a convention. So far four of these votes have been held and the people have voted against having a convention.

This method allows people to bypass reluctant legislators at the state level, but does not address the problem of a "run away" convention.

At the federal level, we need a procedure that limits the scope of a constitutional convention so modest objectives can be addressed when the U.S. Congress fails to act.

I propose an amendment to the U.S. Constitution that restricts the scope of any convention called, and restricts the results that may be submitted to the states. Attempting to give credit to the brevity present in the original article, I suggest:

Amendment Number ____

Article 5 is hereby amended to limit the subjects considered at any Constitutional Convention called pursuant to this article to those contained in the calls from 2/3 of the states. If more than 2/3 of the states issue a call for a convention prior to the actual seating of the convention delegates, those topics defined in all of the most expansive 2/3 of the states calls shall comprise the subjects to be considered. Any topics passed by the convention that are beyond the scope of these calls shall not be included in any amendment(s) proposed to the states.

This proposal:

1) Revives the constitutional convention method,
2) Limits convention topics,
3) Permits some variation in the state calls for a convention,
4) Prevents a state from inserting a "poison pill" call if 2/3 of the other states have issued a legitimate call, and
5) Restricts any amendment proposed to the states to topics contained in on the original calls.

In column 8 of this series I will propose yet a third formal method of introducing Constitutional amendments to the states for potential ratification.[ii]

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[i] The remaining part of Article 5 states that "…Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. Obviously since we are now past 1808 that provision is no longer in force.

[ii] This method, a special Constitutional Review Court, requires a significant addition to our Constitution. I believe a good discussion of the alternatives is desirable before taking up what might be a fairly controversial topic.